



IN THE
Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,
vs.

ROBERT UPLINGER and SUSAN BUTLER,
Respondents.

**BRIEF AMICUS CURIAE OF THE ATTORNEY
GENERAL OF THE STATE OF NEW YORK**

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Question Presented

Whether New York Penal Law § 240.35(3), as applied to respondents, violates the rights of freedom of speech and privacy guaranteed by the United States Constitution.

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**BRIEF AMICUS CURIAE OF THE ATTORNEY
GENERAL OF THE STATE OF NEW YORK**

Interest of the Amicus

The *amicus curiae*, the Attorney General of the State of New York, submits this brief pursuant to Supreme Court Rule 36.4, which permits the Attorney General of a state to submit an *amicus curiae* brief without the consent of the parties. Pursuant to his responsibilities as chief legal officer of the State under New York Executive Law § 63 and his responsibilities to protect the civil rights and liberties of New York's citizens, the Attorney General urges this Court to rule that New York Penal Law § 240.35(3), as

applied here, violates the rights of freedom of speech and privacy afforded by the United States Constitution. The New York Court of Appeals, however, unnecessarily struck down the statute in its entirety. Penal Law § 240.35(3) is constitutional to the extent that it prohibits conduct other than loitering for the purpose of engaging, or soliciting another person to engage, in consensual sodomy.

Statement of Facts

Respondents Robert Uplinger and Susan Butler were charged in separate incidents in the City of Buffalo, New York, with violating a subsection of New York's loitering statute, New York Penal Law § 240.35(3) (McKinney 1980), which prohibits loitering or remaining "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature."

Uplinger

On August 7, 1981 at 3:15 a.m., in Buffalo, New York, Robert Uplinger was arrested for the offense of loitering for the purpose of soliciting a person to engage in deviate sexual intercourse. (Joint Appendix ["J.A."] 13, 103-05). Uplinger had approached an undercover male police officer and spoke with the officer for approximately ten to fifteen minutes prior to his arrest. (J.A. 104). The officer had been assigned to the area, which was frequented by gay males, for the purpose of arresting suspected homosexuals if he was propositioned. (J.A. 62-65, 105). Several other males approached and spoke with the officer and Uplinger. As the group conversed, two other police officers came by on

patrol and ordered the group to move on. As they walked away, Uplinger invited the undercover police officer to his apartment. (J.A. 104). When asked what he wanted to do there, Uplinger responded "I'll blow you". This statement was deemed an invitation for oral sex and Uplinger was then arrested. (J.A. 104-05). Nothing that the undercover officer did gave any indication that the defendant's eventual sexual advances were unwelcome. There was no mention of money at any point in the conversation. (J.A. 76, 103-05).

Butler

Respondent Susan Butler was arrested on April 1, 1981 in Buffalo at about 12:30 a.m. (J.A. 1). Butler, who had a prior record for prostitution, was observed waving at cars. (J.A. 1-2). A police officer followed a car that Butler entered and observed her committing an act of oral sodomy. (J.A. 2). Both Butler and the driver were charged with loitering to commit a deviate sexual act. (J.A. 2).

Procedural History

The Buffalo City Court denied Uplinger's motion to dismiss the action on the ground that Penal Law § 240.35(3) was unconstitutional, and convicted him of violating the statute. The conviction was appealed to the Erie County Court where it was considered along with *People v. Butler*, 110 Misc.2d 843, 443 N.Y.S.2d 40 (Buffalo City Ct. 1981). In *Butler*, the City Court had granted the defendant's motion to dismiss, holding that Penal Law § 240.35(3) was unconstitutional. The Erie County Court upheld the conviction in *Uplinger* and reinstated the information in *Butler*. *People v. Uplinger*, 113 Misc.2d 876, 449 N.Y.S.2d 916 (Erie Co. Ct. 1982). After leave to appeal was granted, the New

York Court of Appeals reversed the order of the County Court and directed that both informations be dismissed. *People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (1983). On October 3, 1983, this Court granted certiorari. — U.S. —, 104 S. Ct. 64.

Summary of Argument

New York Penal Law § 240.35(3), which prohibits loitering or remaining “in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature,” as applied to respondents, infringes upon the constitutional guarantees of freedom of speech and the right to privacy. The statute, as applied, punishes persons simply for their words and for their decision to engage in consensual sexual activity protected by the right to privacy. No compelling governmental interests exist to justify infringement of these fundamental constitutional rights, and, therefore, the statute may not constitutionally be applied to these respondents.

The New York Court of Appeals, however, erred in striking down the statute *in toto*. Areas of behavior remain which New York State may prosecute criminally under Penal Law § 240.35(3) without violating the constitution. Therefore, the order of the Court of Appeals should be vacated and the cases remanded to the Court of Appeals with a direction that the application of Penal Law § 240.35(3) be prohibited with respect to persons who loiter for the purpose of engaging, or soliciting another person to engage, in consensual “deviate sexual intercourse”, as that term is defined in Penal Law § 130.00(2).

ARGUMENT

POINT I

New York Penal Law § 240.35(3), as applied, violates the right to freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This case presents the issue of whether a state may punish a person solely because in a public place he verbally invites another, in a discreet and inoffensive manner, to partake in a sexual act in private which the highest court of that state has declared to be lawful.* The New York Attorney General respectfully submits that the First Amendment, as applied to the states by the Fourteenth Amendment, prohibits such punishment.

Respondent Robert Uplinger, a homosexual, was arrested because he verbally tried to seduce an undercover police officer in a discreet and inoffensive manner.** The

* In 1980, prior to Uplinger's arrest, the New York State Court of Appeals had struck New York's prohibition of consensual sodomy on the grounds that it violated both the constitutional guarantee of privacy and the equal protection clause of the Fourteenth Amendment. *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981). See Point II, below.

** Respondent Susan Butler, although observed attempting to flag down cars and later observed in the act of consensual sodomy inside a car parked on a public street, was not charged with public lewdness, Penal Law § 245.00, or loitering for the purpose of engaging in prostitution, Penal Law § 240.37. Because Penal Law § 130.38 had been found unconstitutional by the New York Court of Appeals on equal protection and privacy grounds, *People v. Onofre*, and no statute prohibiting public acts of consensual sodomy has been enacted by the New York legislature, the District Attorney evidently believed Ms. Butler could not be prosecuted for the actual act which she was

(footnote continued on next page)

question here is not the morality of Uplinger's intended acts, but whether his words may be constitutionally punished. The Attorney General submits that they may not. There are no facts before this Court which would place Uplinger's words beyond the First Amendment's protections. He did not invite or encourage anyone to break any law in effect in New York State. *Cf. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). His behavior did not harass or annoy anyone, or incite anyone to violence. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Uplinger's words, although said in a "public place", were not publicly spoken: there were no witnesses, willing or unwilling, to the conversation between him and the undercover police officer.* Uplinger's words, while perhaps sexually explicit slang, were not sufficiently erotic to meet the threshold test for obscenity. Accordingly, those words are protected by the First Amendment. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975); *Cohen v. California*, 403 U.S. 15 (1971).

observed committing in a car on a public street. Instead, she was prosecuted under Penal Law § 240.35(3) for her gestures, which were taken to be invitations to persons to commit deviate sexual intercourse with her. The propriety of her arrest must be judged not by whether her conduct may ever be constitutionally punished, but by whether she may constitutionally be punished for the crime with which she was charged. In this respect, her case must be judged by the same standards as Uplinger's.

* "Public place" is broadly defined by the New York Penal Law:

"Public place" means a place to which the public or a substantial group of persons has access, and includes but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. Penal Law § 240.00(1).

“[T]he First Amendment has not generally been confined to the protection of high-minded discussion among savants. . . .” L. Tribe, *American Constitutional Law* (1978) at 666. “[S]o long as the means are peaceful, the communication need not meet standards of acceptability.” *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Entertainment, including entertainment of a sexual nature, is protected by the First Amendment. *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205; *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). New York State may not constitutionally punish Uplinger for his words alone, when he engaged in no “separately identifiable conduct” which was illegal. *Cohen v. California*, 403 U.S. 15, 18.

Moreover, the First Amendment generally prohibits a state from drawing distinctions based upon the content of its citizens’ speech. In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), this Court reiterated this principle when it struck down a local ordinance which permitted labor union picketing and prohibited all other types of picketing. Justice Marshall wrote for the Court, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” 408 U.S. 92, 95. Because Uplinger’s speech is of a kind protected by the First Amendment, the state may not prohibit it while permitting other kinds of speech at the same time and place and in the same manner.*

* This Court has recognized an exception to the content-neutrality rule in the context of zoning regulations which serve a substantial state interest. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Obviously, this exception does not apply here.

Of course, if the New York legislature or the City of Buffalo so desired, each could place reasonable time, place and manner restrictions on the use of their streets, bearing in mind that streets are akin to public forums. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Such restrictions, of course, would have to be content-neutral and serve a substantial governmental purpose. *Heffron*, 452 U.S. 640, 648; *Mosley*, 408 U.S. 92, 95-99. In *Heffron*, this Court upheld a Minnesota state fair rule limiting solicitation by any group at the Minnesota state fair to a particular time, place and manner, i.e., from duly licensed booths on the fair grounds. Because the members of the Krishna Society who challenged the rule were treated no differently than members of any other group seeking to solicit at the fair, and because solicitation itself was not barred, the Court found no infringement of their First Amendment rights. In stark contrast to the regulation at issue in *Heffron*, Penal Law § 240.35(3), as applied, prohibits altogether one kind of speech in all public places: speech aimed at obtaining a certain form of sexual gratification even though no operative law bars the sexual conduct itself.*

Finally, although a prohibition on speech may be justified by compelling state interests, no such interests exist here to justify this invasion of First Amendment rights. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-215; *Stanley v. Georgia*, 394 U.S. 557, 566-68 (1969); *Street v. New York*, 394 U.S. 576, 590-93 (1969).

* Even in *American Mini Theatres, Inc.*, where this Court permitted Detroit to impose on adult theatres zoning regulations, the Court emphasized that Detroit was not prohibiting adult theatres altogether, but simply regulating where they could be established. 427 U.S. 50, 70-71.

Three interests of the State have been suggested to justify the broad reach of Penal Law § 240.35(3). These interests are: (1) protecting "the right of an individual to choose not to hear on public streets solicitations of a lewd and intimate nature," Petitioner's Brief ("Pet. Br.") at 16; (2) protecting minors from deviate sexual activity, and, in particular, preventing them from becoming "involved as solicitors of deviate sex for payment", Pet. Br. at 18-19; and (3) preventing public nuisances, Pet. Br. at 20. None of these asserted interests justify the broad reach of the statute.

The soliciting speech of Uplinger, and that of others whom the statute similarly would catch in its net, is not an audio or visual assault directed at a "captive audience". Cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Kovacs v. Cooper*, 336 U.S. 77 (1949). Passersby disturbed by activities of persons such as Uplinger may avert their eyes and ears, or simply say "no" to unwelcome, but unforced, overtures. *Cohen v. California*, 403 U.S. 15, 21; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-12 (1975).^{*} And because the statute reaches entirely private conversations between willing participants—where there is no audience—the prohibition may not be justified by the principle that the government may act to limit speech "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21.

As for the protection of minors, Penal Law § 240.35(3) is not specifically, or narrowly, drafted to address that

^{*} The statute cannot, on "moral sensibility" grounds, be justified as discouraging deviate sexual intercourse between willing participants, because this sexual activity is legal in New York. *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947.

important purpose. It carries along much protected activity in its sweep, see *Erznoznik*, 422 U.S. 205, 212-14. While New York could bar solicitation of minors for sexual activity—consensual or not, this statute does far more. Indeed, other laws exist to guard against this evil. See, e.g., Penal Law §§ 230.04-06, 230.25-32.*

Lastly, a statute cannot survive scrutiny under the First Amendment when its purpose simply is to prevent the annoyance of passersby; “‘[u]ndesirables’ or their ‘annoying’ conduct may not be punished.” *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). See also *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (“The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be ‘annoying’ to some people.”).

The City of Buffalo, like the City of Cincinnati in *Coates*, has narrower options available to it to ensure that its streets remain usable by the public at large and are not controlled by any one social group:

The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. 402 U.S. 611, 614.

* Even if those other laws “do not easily succumb to enforcement due to the problem of proving payment absent solicitation of an undercover police officer,” Pet. Br. at 19, that fact cannot justify the reach of the statute here. A similar argument was rejected by this Court in *Stanley v. Georgia*, 394 U.S. 557, 567-68, which declared that a “restriction [of a fundamental right] may not be justified by the need to ease the administration of otherwise valid criminal laws [citation omitted]”.

New York's legitimate interests in prohibiting harassing and annoying behavior on its streets, and in protecting its youth, may be met by utilizing existing criminal statutes which prohibit, *inter alia*, criminal solicitation, Penal Law §§ 100.00-08; sodomizing minors, Penal Law §§ 130.40-50; patronizing a minor prostitute, Penal Law §§ 230.04-06; promoting the prostitution of minors, Penal Law §§ 230.25-32; unlawful assembly, Penal Law § 240.10; disorderly conduct, Penal Law § 240.20; harassment, Penal Law § 240.25; loitering for the purpose of engaging in a prostitution offense, Penal Law § 240.37; criminal nuisance, Penal Law § 240.45; and public lewdness, Penal Law § 245.00. Also, the state could enact legislation narrowly tailored to its specific interest, *e.g.*, legislation which prohibits solicitation in a public place to engage in sexual behavior where the solicitation is of a harassing nature. *People v. Uplinger*, 58 N.Y.2d 936, 938, 460 N.Y.S.2d 514, 515.

In short, because Penal Law § 240.35(3), as applied, prohibits speech protected by the First Amendment and the State of New York has no compelling interests to justify the statute's incursion into this constitutionally protected area, Penal Law § 240.35(3)'s reach must be limited to loitering activities unprotected by the First Amendment.* The soliciting speech of Uplinger and others like him is precisely the kind of speech—unpopular and representing a minority point of view—that the First Amendment was designed to protect. *See Stanley v. Georgia*, 394 U.S. 557, 565-66.

* The New York Court of Appeals' conclusion that the statute must be struck in its entirety was incorrect. *See* Point III, below.

POINT II

New York Penal Law § 240.35(3), as applied, violates the right to privacy guaranteed by the First, Fourth, Ninth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Penal Law § 240.35(3), at issue here, is inextricably linked to Penal Law § 130.38, which blanketly proscribed consensual sodomy between unmarried persons.* In holding Penal Law § 240.35(3) unconstitutional in the instant case, the New York Court of Appeals relied on its previous decision in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981), which struck Penal Law § 130.38 as unconstitutional on the ground that it violated both the rights of privacy and equal protection contained in the United States Constitution.

The Court of Appeals' opinion in *Uplinger* held that because consensual sodomy was no longer illegal, it would be improper for the state to punish loitering for the purpose of engaging, or soliciting another to engage, in that conduct. *Uplinger*, 58 N.Y.2d 936, 938, 460 N.Y.S.2d 514, 515. The New York State Attorney General respectfully urges this Court to adopt the sound reasoning of the New York Court of Appeals in support of its holdings that both statutes violate the right to privacy embodied in the penumbras of the First, Fourth, Ninth and Fourteenth Amendments.

* Penal Law § 130.38 provides that "a person is guilty of consensual sodomy when he engages in deviate sexual intercourse. . . ." Deviate sexual intercourse is defined as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva". Penal Law § 130.00(2).

The right to privacy is, of course, fundamental to our American democracy. As Justice Brandeis eloquently wrote over 50 years ago:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

This Court has not placed any firm boundaries on this most basic right. *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977). Instead, it has expanded the right of privacy to fit the requirements of a modern society.

The right to privacy encompasses: personal decisions relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and abortion, *Roe v. Wade*, 410 U.S. 113 (1973). The right also guarantees a person the freedom to possess obscene material in the privacy of his home. *Stanley v. Georgia*, 394 U.S. 557. In general terms, the constitutional right of privacy encompasses “the interest in independence in making certain kinds of important decisions,” *Carey v. Population Services International*, 431 U.S. 678, 684, citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), and “the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy,” *Stanley v. Georgia*, 394 U.S. 557, 564.

Because unmarried persons are protected from unwarranted intrusions into matters "so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U.S. 438, 453, and because persons may obtain gratification from obscene materials in their home, *Stanley v. Georgia*, 394 U.S. 557, 565, there should be no question that, as the New York Court of Appeals held in *People v. Onofre*, the right to privacy extends as well to unmarried persons who engage in consensual sex, including consensual sodomy, in a private place, and that Penal Law § 130.38 violates that right of privacy:

[T]he People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State. 51 N.Y.2d 476, 490, 434 N.Y.S.2d 947, 952.

Moreover, as the Court of Appeals held, Penal Law § 130.38 also violates the equal protection clause, as it bars unmarried persons, but not married persons, from engaging in certain sexual acts. See *Eisenstadt v. Baird*, 405 U.S. 438, 447.*

* The New York Court of Appeals was cognizant of the argument that consensual sodomy is immoral and, as such, should be prohibited by the legislature. The Court recognized, however, that morality in personal decision-making, when the outcome creates no harm to anyone, may not be legislated:

We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to pro-

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Further, New York State may not constitutionally bar persons from loitering or remaining "in a public place for the purpose of engaging, or soliciting another person to engage, in" consensual sodomy—conduct protected by the Constitution. Even in public places, individuals retain certain privacy interests. *Cf. Katz v. United States*, 389 U.S. 347, 351 (1967). Where, as here, Uplinger did not engage in any harassing, annoying or bothersome activity, but merely conveyed his personal desires in a discreet and inoffensive manner, and in a wholly private conversation, he cannot be said to have relinquished his right to privacy in sexual matters simply because his conversation took place in a public place. As the New York Court of Appeals in *Onofre* recognized:

At the outset it should be noted that the right [of privacy] addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint—what we referred to in *People v. Rice* [citation omitted] as "freedom of conduct" [citation omitted]. *People v. Onofre*, 51 N.Y.2d 476, 485, 437 N.Y.S.2d 947, 949.

The right to privacy in sexual matters, including the freedom to make sexual choices, would be unduly burdened if persons are denied the access to exercise the right discreetly

hibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other non-coercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose. 51 N.Y.2d 476, 488, n. 3, 434 N.Y.S.2d 947, 951, n. 3.

and inoffensively. *See Carey v. Population Services International*, 431 U.S. 678, 685-87.

Because there are no compelling interests to justify the invasion of privacy rights by Penal Law § 240.35(3), *see* pp. 9-11, above, the statute, as applied to persons who, like Uplinger, seek to engage in consensual sodomy, should be held unconstitutional.

POINT III

New York Penal Law § 240.35(3) is not facially invalid, and need not be struck in its entirety.

The New York Court of Appeals unnecessarily struck down Penal Law § 240.35(3) in its entirety, *People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514.* Penal Law § 240.35(3) is constitutional insofar as it prohibits loitering for the purpose of engaging, or soliciting another to engage, in deviate sexual conduct *other than* consensual sodomy.** Thus, prosecutions for loitering for the purpose of soliciting minors to engage in deviate sexual intercourse or other sexual behavior of a deviate nature are not unconstitutional applications of the statute. Unlike consensual sodomy, the underlying conduct—sexual activity with a minor—may be constitutionally prohibited. *See New York v. Ferber*, — U.S. —, 102 S.Ct. 3348, 3354 (1982) (a

* "A state court is not free to avoid a proper facial attack on federal constitutional grounds. [citation omitted]. By the same token, it should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution." *New York v. Ferber*, — U.S. —, 102 S. Ct. 3348, 3360 (1982).

** Penal Law § 240.35(3) prohibits loitering or remaining "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse *or other sexual behavior of a deviate nature*." (emphasis added).

“state’s interest in ‘safeguarding the physical and psychological well being of a minor’ is ‘compelling’. [citation omitted].”).

Because Penal Law § 240.35(3) may, in certain instances, be applied in accordance with constitutional dictates, it should not have been found unconstitutional in its entirety, but simply in its application to those who loiter for the purpose of engaging, or soliciting another person to engage, in consensual “deviate sexual intercourse”, as that term is defined in Penal Law § 130.00(2).

Conclusion

The order of the Court of Appeals should be vacated and the cases remanded to the New York Court of Appeals with a direction that the application of Penal Law § 240.35(3) be prohibited only with respect to persons who loiter for the purpose of engaging, or soliciting another person to engage, in consensual “deviate sexual intercourse”, as that term is defined in Penal Law § 130.00(2).

Respectfully submitted,

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